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IN THE SUPREME COURT OF THE UNITED STATES

Rachel Haas, Carol Haas, and Richard Haas
Petitioners,

v.

Quest Recovery Services, Inc. and State of Ohio
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY

I. The Opinion of the Sixth Circuit Court of Appeals squarely conflicts with decisions of the First, Ninth, and Eleventh Circuit Courts of Appeal and unjustifiably subverts Congressional intent to redress all forms of governmental handicap discrimination through Title II of the Americans with Disabilities Act.

What is perhaps most striking about the Brief in Opposition to Writ of Certiorari which has been submitted by Respondent, State of Ohio (hereinafter "State's Brief"), is the absence of any discernable response to several critical issues. For example, no attempt has been made to explain how a "rational basis" can exist for the failure to furnish Petitioner, Rachel Haas, with the handicap accessibility features and equipment she needed to avoid having to hop up and down stairs on her one remaining leg, shower without having to sit on the floor, freely move her wheelchair in and out of her room, and otherwise participate in the Driver Intervention Program (DIP) she was obligated to attend. In paragraphs 35 through 38 of her First Amended Complaint, Petitioner had squarely alleged that she had suffered unjustifiable and unlawful "disparate treatment" which her non-disabled counterparts had not been forced to endure. *Corrected Petition for Writ of Certiorari filed February 19, 2008 (hereinafter "Cert. Pet."), Appendix pp. 66g-67g.* Respondent's inability to formulate a "rational basis" for the condition of the state-owned facility serves to confirm the validity of this classic case of a

core equal protection violation. *Cleburne v. Cleburne Living Cntr.*,473 U.S. 432, 448, 105 S.Ct. 3249, 3258, 87 L.Ed.2d 313 (1985). Proper application of this Court's recent decision in *United States v. Georgia*, 546 U.S. 151, 126 S.Ct. 877, 163 L.Ed.2d 650 (2006), leads to the inescapable conclusion that no Eleventh Amendment immunity is available to Respondent.

Respondent has attached great significance to the existence of administrative regulations in Ohio requiring that DIP facilities to be handicap accessible. *States' Brief, p. 4.* It is evident that these provisions are not actually being enforced and Congress' refusal to allow the states to police themselves is thus sound. The only architectural testimony which was ever submitted before the Rehabilitation Act claim was settled confirmed, in no uncertain terms, that the building where Petitioner was housed did not contain even the most basic equipment and features necessary for her to fully and properly participate in the program. *Plaintiff's Revised Motion for Partial Summary Judgment filed September 30, 2004, Exhibit A.* Tellingly, Respondent has stopped well-short of ever representing in the instant appeal that the structure was indeed fully handicap accessible in accordance with all controlling federal and state regulations. There is thus no basis for Sixth Circuit's astonishing determination, which was supposedly reached from the pleadings alone, that the DIPs "when viewed in their entirety, are readily accessible to be usable by individuals with disabilities" *Cert. Pet., Appendix p. 6b.*

Although the appellate court's Opinion on Remand of August 21, 2007 was carefully confined to the

heightened pleading standards which have now been imposed upon individuals seeking relief under the Americans with Disabilities Act (ADA), the fact remains that Respondent's Eleventh Amendment analysis in the proceedings below had been centered upon *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (*en banc*), which rests upon one side of a deep conflict which had developed amongst the circuits. Consistent with *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972, 155 L.Ed. 2d 93 (2003), the First, Ninth and Eleventh Circuits have all concluded that Congress properly abrogated this grant of immunity as permitted by Section 5 of the Fourteenth Amendment. *Toledo v. Sanchez,* 454 F. 3d 24 (1st Cir. 2006); *Phiffer v. Columbia Riv. Corr. Inst.,* 384 F. 3d 791, 792-793 (9th Cir. 2004); *Association for Disabled Americans v. Florida Intl. Univ.,* 405 F. 3d 954 (11th Cir. 2005). The schism is plainly widening, as the Third Circuit recently recognized in *Bowers v. National Coll. Athl. Ass'n.,* 475 F. 3d 524, 550-556 (3rd Cir. 2007), that the legislature acted within its constitutional authority by seeking to eradicate handicap discrimination within the public education system.

There is no truth to the State's representations that the Sixth Circuit stands alone in refusing to recognize the full constitutional validity of Title II of the ADA. *State's Brief, p. 20* ("Once the Sixth is removed, as it must be, no split – soft or hard, old or new · remains.") As had been observed earlier in these proceedings, the Eighth Circuit shares the misguided view that Congress went too far in allowing damages to be recovered in response to State-sponsored handicap discrimination. *Klingler v. Director, Dept. of Rev.,*

455 F. 3d 888, 896-897 (8th Cir. 2006). Notably, this rash ruling was issued after both *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004), and *Georgia,* 546 U. S. 151, both of which were examined by the appellate court. There is thus no merit to the assertion, which both Respondents and Intervenor have asserted over – and – over, that uniformity was achieved across the United States following this Court's last venture into the Eleventh Amendment thicket.

Respondent has criticized Petitioners for failing to identify any "post-*Lane*" authorities from the Sixth Circuit confirming that *Popovich*, 276 F. 3d 808, is still being followed. *State's Brief, pp. 19-20.* Intervenor also seems to feel that "except for the now-superseded opinion in this case, the Sixth Circuit has not adhered to *Popovich* in any reported disposition since this Court decided *Lane*. *United States' Brief, pp. 12-13.* What they are both neglecting to mention is that the district courts in the Sixth Circuit remain duty-bound to abide by the deeply flawed *en banc* opinion, which has yet to be modified in any manner, let alone overturned. Well after the release of *Lane*, it was recognized in *Tanney v. Boles*, 400 F. Supp. 2d 1027, 1044-1045 (E. D. Mich. 2005), that:

> A Title II ADA claim against a government official in her official capacity for money damages is barred if it sounds in equal protection rather than due process. *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F. 3d 808, 811 (6th Cir. 2002). [footnote omitted]

A motion to dismiss was granted in that instance because "the basis of the only ADA claim Plaintiff asserts sounds in equal protection." *Id. at 1046.* Numerous courts within this jurisdiction have been forced to reach the same harsh result. *Skibbe v. Michigan Dept. of Corr.*, U. S. Dist. Ct., W. D. Mich., Case No. 1:05-CV-175, 2006 W. L. 625869 *3 (March 9, 2006), unreported (upholding Eleventh Amendment challenge to handicap discrimination claim based upon *Popovich*); *Goodwin v. Caruso*, U. S. Dist. Ct., W. D. Mich., Case No. 2:05-CV-150, 2005 W. L. 1667391 (July 15, 2005), unreported (citing *Popovich* and concluding that the "Sixth Circuit has expressly ruled that the Eleventh Amendment bars a Civil Rights action to the extent that it relied on congressional enforcement of equal protection in non-employment ADA cases, although a due process claim of denial of participation in public services was not barred"; *Zibbell v. Granholm*, U. S. Dist., W. D. Mich., Case No. 2:07-CV-96, 2008 W.L. 1766588 *5 (April 14, 2008), unreported (holding that state agencies are entitled to immunity on ADA claims as a result of *Popovich*); *Cox v. Correctional Med. Servs.*, U. S. Dist. Ct., E. D. Mich., Case No. 06-CV-10350-DC, 2007 W.L. 2873208 *7 (February 20, 2007), unreported (Magistrate's decision recommending dismissal of Title II ADA claim on the basis of *Popovich's* Eleventh Amendment immunity analysis). Countless other disabled residents of Ohio, Kentucky, Tennessee and Michigan have undoubtedly refrained from even filing Title II ADA claims against state agencies and instrumentalities out of recognition that the *en banc* opinion in *Popovich,* 276 F. 3d 808, remains the law of the land. Unless and until this Court intercedes, the

full benefits and protection which Congress intended to afford will likely never be realized.

Since *Popovich* remains alive and well and the Eighth Circuit is now following the same unduly restrictive view of Congressional authority, the United States' sound analysis of the fundamental flaws in these holdings should be carefully considered. When Petitioners first requested *certiorari* from this Court two (2) years ago, the Intervenor cogently explained that at least two (2) separate justifications existed for holding that Title II of the ADA had completely abrogated Eleventh Amendment immunity. *Brief for the United States as Intervenor, Case No. 06-263 filed September 29, 2006, pp. 7-13.* First *Georgia*, 546 U.S. 151, had been decided during the course of Petitioners' appeal and concerned "a similar challenge to the operation of correctional facilities and programs". *Id., p. 8.* Therein, this high court ruled that immunity was unavailable when the discrimination "*actually* violates the Fourteenth Amendment", which had never been previously considered by the Sixth Circuit. *Id., pp. 8-9 (italics original).* Second *Popovich* is – in the words of the United States – "irreconcilable with *Lane*". *Id. p. 10.* There thus appears to be no dispute amongst the parties to the instant appeal that this outdated Sixth Circuit precedent must go.[1]

II. The Sixth Circuit's overly expansive view of absolute judicial immunity now permits governmental entities in that jurisdiction to

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[1] Respondent also appears to be conceding that *Popovich* "must be" set aside. *States' Brief, p.20.*

discriminate with impunity against anyone who is subject to a judicial order.

Neither Respondent nor Intervenor have made any attempt to trivialize the frightening implications of the Sixth Circuit's theory of absolute judicial immunity. Respondent's position is simply that the law is "well-settled" in this regard and there is thus no "reason to revisit this settled law." *States' Brief, p. 21.* Apparently, the law is not "settled" enough for the State to be able to locate a judicial opinion issued from outside the Sixth Circuit actually holding that "absolute judicial immunity" applies to the claims of a disabled criminal defendant who is required to endure confinement in a non-handicapped state-owned facility, because none have been cited. *Id., pp. 21-23.* The only decision which has been identified in support of this "well-settled" law is *Pierson v. Ray*, 386, U. S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967), which held only that a judge may not be sued for civil rights violations under 42 U.S.C. §1983 for acts committed within his/her judicial discretion. *States' Brief, pp. 21-22.* As Justice Ginsburg had intimated during Petitioners' first appearance before this Court, such a principle would seemingly have no application here since no judge has been named as a defendant. *Haas v. Quest Recovery Servs.*, ___ U.S. ___, 127 S. Ct. 1121, 166 L. Ed. 2d 888 (2007).

In attempting to formulate a response to Justice Ginsburg's query as to how absolute judicial immunity could apply in this instance, Respondent has offered that:

> The answer is that a lack of a judicial defendant, coupled with [Petitioner's]

> admission that the judge did nothing wrong, means that [Petitioner] has no theory of liability through the judge to begin with. Immunity, therefore, does not matter.

States' Brief, p. 22. Exactly! Even though Petitioners had never once sought to hold the municipal judge liable for the deplorable condition of the DIP facility, the Sixth Circuit felt compelled to find that they were "in effect suing the State of Ohio in attempt to sue the municipal court judge" *Cert. Pet., Appendix, p. 14c.* Just as the District Judge did, the court's analysis then veered wildly into the theory that the disabled DIP program participant had no legal basis to complain about her non-handicapped accessible accommodations since she was attending the facility by court order. *Id., pp. 14c-18c.* As Respondent now seems to be conceding, this holding is legally indefensible. Before courts begin routinely dismissing claims brought by individuals confined in correctional facilities alleging discrimination of all forms (racial, sexual, handicap, *etc.*) on the grounds that "absolute judicial immunity" attaches to the sentencing order, this Court should accept this opportunity to carefully consider the wisdom of the Sixth Circuit's holding.

III. Petitioners' First Amended Complaint alleging a claim of Title II disability discrimination satisfies the notice-pleading requirements imposed by Fed.R.Civ.P. 8(a), particularly given that the pleading was prepared without the benefit of *Georgia*, 546 U.S. 151.

It seems highly unlikely that the Sixth Circuit will ever have occasion to reconsider *Popovich*, 276 F. 3d 808, given the exceedingly high pleading requirements which have now been imposed upon Title II claimants. Respondent contends that the theory of Title II liability which is based upon the State's ownership and control of the DIP facility requires "the additional factual allegations – absent here – that the building falls under the ADA – that is, that it was built or extensively renovated after the ADA was enacted." *States' Brief, pp. 12-13.* One would have thought that the government would be troubled by the fact that they have made this bold declaration without any citation to any judicial authorities from anywhere in the United States, but this does not appear to be the case. The State also remains unconcerned with its continued inability to explain how Petitioners were supposed to allege details as to when the building was constructed and "extensively renovated" without the benefit of discovery.

Respondent's latest challenges to the sufficiency of First Amended Complaint are based upon 28 C.F.R. §35.150(b)(1) which supposedly removes existing structures from the scope of Title II save only when there have been "extensive renovations.". *States' Brief, p. 14.* In reality, the provision states merely:

> ***A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of §35.151. In choosing among available methods for

> meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate. [emphasis added]

As can be readily observed, neither this subsection – nor any other regulation which the undersigned counsel has been able to locate – actually excuses non-compliance with federally mandated handicapped accessibility requirements for every existing structure which has yet to undergo "extensive renovation". The narrow exception applies only when "other methods can make the program or service accessible." *Toledo,* 454 F. 3d at 39; *Schotz v. Cates,* 256 F. 3d 1077, 1080 (11th Cir. 2001); *Cooper v. Weltner,* U. S. Dist. Ct., D. Kan., Case No. 97-3105-JTM, 1999 W. L. 1000503 *5-6, unreported. States and other public entities certainly are not free to discriminate against the handicapped by forcing them into un-renovated facilities, as the Ninth Circuit has explained:

> While the County need not make all of its existing facilities accessible to individuals with or without disabilities, it is expected to provide "program access." 28 C.F.R. Pt. 35, App. A. Any type of educational, vocational, rehabilitative, or recreational program, service, or activity offered to non-disabled detainees should, when viewed in its entirety, be similarly available to disabled detainees who, with or without reasonable accommodations, meet the essential eligibility requirements to participate. Whether

> this "program access" standard may reasonably be met or whether any restriction on access is reasonably related to a legitimate government objective is necessarily fact-specific. *** [emphasis added]

Pierce v. County of Orange, 526 F. 3d 1190, 1222 (9th Cir. 2008). This federally mandated "program access" requirement lies at the heart of Petitioners' Title II claim against Respondent.

The better reasoned view which is in force in more enlightened circuits is that an ADA claim only requires allegations that the plaintiff "was excluded from participation in, or denied the benefits of, a program or service offered by a public entity, *or* subjected to discrimination by that entity." *Constantine v. Rectors and Visitors of George Mason Univ.,* 411 F. 3d 474, 499 (4th Cir. 2005) (citation omitted). There can be no legitimate disagreement that the First Amended Complaint supplies a "short and plain statement of the claim" sufficient to satisfy the minimal requirements of Fed. R. Civ. P. 8 (a). *Fiscus v. Wal-Mart Stores, Inc.,* 385 F. 3d 378, 385 (3rd Cir. 2004); *Costabile v. County of Westchester, New York,* 485 F. Supp. 2d 424, 433-435 (S.D. N.Y. 2007); *Alfano v. Bridgeport Airport Servs.,* 373 F. Supp. 2d 1, 3-7 (D. Conn. 2005).

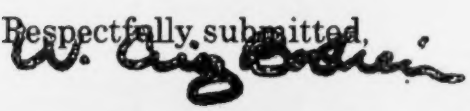
The federal government's primary contention is that following the remand from this Court the appellate panel correctly determined that the First Amended Complaint still failed to allege a potentially viable claim for relief "in accordance with the *Georgia* framework". *United States' Brief p.9.* The glaring

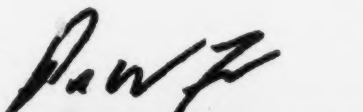
flaw in this logic, which neither Intervenor nor Respondent have thus far been willing to confront, is that *Georgia*, 546 U.S. 151, was issued after the District Court proceedings had concluded, the appeal had been fully briefed, and oral argument had been conducted. At no time were Petitioners ever afforded an opportunity to revise their pleadings to reflect the current state of Eleventh Amendment jurisprudence. At the time their pleading were prepared, *Popovich*, 276 F. 3d 808, reigned supreme in the Sixth Circuit and ADA claims against the State sounding strictly in equal protection were barred. Petitioners' objective was to seek a substantial modification, if not outright reversal, of the deeply flawed ruling either in the Sixth Circuit or before this Court and they had no reason to believe that artful pleading would allow them to avoid such a confrontation. Intervenors' glowing praise of the Sixth Circuit's dismissal of the First Amended Complaint on the basis of the new standard which was announced by this Court in *Georgia* while the appeal was still pending is thus seriously misguided.

CONCLUSION

For the forgoing reasons, this Court should grant certiorari over these proceedings.

Respectfully submitted,





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